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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION and
MON VALLEY ENERGY CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, the Federal Energy Regulatory Commission ("FERC") has promulgated rules governing the rates to be set by state public utility commissions for purchases of electricity by utilities from the developers of "qualifying facilities." PURPA and the FERC rules require that those rates be "just and reasonable" to a utility's customers, and not greater than a utility's "avoided costs." The rules also encourage freely-negotiated purchase agreements between utilities and developers. In this case, the Pennsylvania Public Utility Commission and reviewing courts, in conflict with rulings from other state courts of last resort, have exercised presumed "plenary powers" under PURPA to modify the terms of a negotiated agreement, and have granted a $500 million windfall to a developer by purporting to calculate the utility's avoided costs as of the date of a voluntary agreement executed in 1987, when the agreement would have lapsed but for the modifications imposed by the commission in 1991. The questions presented are:

1. Whether state commissions have been granted broad powers under PURPA to modify the terms of privately-negotiated purchase agreements, and to excuse developers from meeting their contractual obligations to a utility, when those obligations were designed to protect the utility's customers from unfair and excessive rates; and

2. Whether state commissions, in determining the date on which a utility's avoided costs are to be calculated under PURPA, may decide that the relevant "legally enforceable obligation" to deliver power existed as of the date of an executed voluntary agreement, even though that agreement later is substantially modified over the utility's objections, and even though the use of the earlier date results in rates that exceed the utility's current avoided costs and that no longer are "just and reasonable" to the utility's customers.

LIST OF PARTIES AND RULE 29.1 LIST

All parties to the proceedings in the Commonwealth Court of Pennsylvania, and all parties before this Court, are listed in the caption of this Petition.

Petitioner West Penn Power Company is a wholly owned subsidiary of Allegheny Power System, Inc. West Penn has two subsidiaries that are not wholly owned by it: Allegheny Generating Company and Allegheny Pittsburgh Coal Company.

Petitioner Armco Advanced Materials Company is a wholly owned subsidiary of Armco, Inc. It has no subsidiaries that are not wholly owned.

Petitioner Allegheny Ludlum Corporation has neither a parent company nor subsidiaries that are not wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners West Penn Power Company, Armco Advanced Materials Company and Allegheny Ludlum Corporation respectfully pray that a writ of certiorari issue to review the judgment of the Commonwealth Court of Pennsylvania entered in this matter on September 3, 1992.

OPINIONS BELOW

The unreported orders of the Pennsylvania Supreme Court, entered on December 30, 1993, denying petitions for allowance of appeal filed by all petitioners from the opinion and order of the Commonwealth Court, are reprinted in Appendices A and B, at 1a-2a. The opinion and order of the Commonwealth Court, including the dissenting opinion, filed on September 3, 1992, are reported at 150 Pa. Commw. Ct. 349, 615 A.2d 951, and are reprinted in Appendix C, at 3a-34a. Application for reargument was denied in an unreported order of the Commonwealth Court reprinted in Appendix D, at 35a.

This Petition concerns the Shannopin Mine Project, developed by respondent Mon Valley Energy Corporation ("Mon Valley"). The proceedings before the Pennsylvania Public Utility Commission ("PUC") and reviewing courts concerning this project have gone through several phases. The first phase commenced with an unreported tentative opinion and order of the PUC, dated July 8, 1988, reprinted in Appendix E, at 36a-85a, which approved a proposed power purchase agreement between petitioner West Penn Power Company ("West Penn") and Mon Valley. Following the decision of the Pennsylvania Commonwealth Court in a related case that PUC approval of such agreements required a trial-type hearing, the PUC consolidated the Shannopin proceedings with proceedings involving several other power purchase agreements between West Penn and developers of proposed "PURPA projects." The consolidation order of September 30, 1988, is reported at 68 Pa. P.U.C. 183, and is reprinted in Appendix F, at 86a-93a. A subsequent PUC

opinion and order on reconsideration, dated January 19, 1989, is reported at 69 Pa. P.U.C. 124, and is reprinted in Appendix G, at 94a-104a.

The unreported recommended decision of the Administrative Law Judge ("ALJ"), following the consolidated hearing, and the unreported motion to approve the recommended decision before the PUC at its public meeting of September 21, 1989, are reprinted in Appendix H, at 105a-208a, and Appendix I, at 209a-221a. The formal order of the PUC approving the Shannopin agreement was entered on September 29, 1989. It is reported at 71 Pa. P.U.C. 60, 106 P.U.R. 4th 459, and is reprinted in Appendix J, at 222a-272a. A separate dissenting opinion is published at 110 P.U.R. 4th 37, and is reprinted in Appendix K, at 273a-277a.

On July 17, 1990, the Pennsylvania Commonwealth Court modified the PUC's order, and remanded for a new calculation of capacity cost credits under the Shannopin agreement, based on West Penn's avoided capacity costs as of the date the agreement was executed. That opinion was unreported, and is reprinted in Appendix L, at 278a-289a. On September 13, 1990, the Commonwealth Court denied an application for reargument and petition for reconsideration. That unreported order is reprinted in Appendix M, at 290a. The Supreme Court of Pennsylvania denied petitions for allowance of appeal, and applications for reconsideration, in unreported orders reprinted in Appendices N and O, at 291a-293a.

On April 27, 1990, while the first phase of the Shannopin proceedings was pending before the Commonwealth Court, the PUC entered an "emergency order" relieving Mon Valley of certain of its contractual obligations to West Penn. On May 10, 1990, the PUC expanded the scope of the relief granted to Mon Valley, over petitioners' objections, and stayed certain automatic termination provisions of the Shannopin agreement, while referring Mon Valley's other proposed modifications to the agreement to an ALJ for hearing. Neither of those PUC orders is reported; they are reprinted in Appendices

P and Q, at 294a-310a. On January 9, 1991, the ALJ entered an unreported order to the effect that West Penn's evidence of its current avoided capacity costs would be stricken. That "Second Pre-Hearing Order" is reprinted in Appendix R, at 311a-314a. The unreported recommended decision of the ALJ, approving the modifications to the agreement sought by Mon Valley, was issued on May 23, 1991, and is reprinted in Appendix S, at 315a-379a. On January 14, 1992, the PUC adopted the ALJ's recommended decision in an unreported opinion and order, reprinted in Appendix T, at 380a-396a.

In the second phase of judicial review, petitioners appealed to the Commonwealth Court from the PUC's opinion and order modifying the Shannopin agreement, and the ALJ's determination to exclude from evidence testimony concerning West Penn's current avoided costs. The Commonwealth Court affirmed by a four to three vote, in the opinion and order described above, from which this Petition arises. *See* Appendix C.

There has been a third phrase of Shannopin proceedings before the PUC and Pennsylvania courts, that are not directly at issue in this Petition. On December 5, 1991, the PUC issued an opinion and order on remand from the first Commonwealth Court decision involving Shannopin, directing the parties to submit recalculations of West Penn's avoided costs as of the contract execution date. That opinion and order is reported at 75 Pa. P.U.C. 544, and is reprinted in Appendix U, at 397a-406a. On May 22, 1992, the PUC issued an opinion and order adopting Mon Valley's recalculations, and rejecting those submitted by petitioners. That unreported opinion is reprinted in Appendix V, at 407a-416a. On appeal by petitioners, the Commonwealth Court reversed the PUC and remanded again for further proceedings. That opinion, entered on March 10, 1993, is reported at 154 Pa. Commw. Ct. 136, 623 A.2d 383, and is reprinted in Appendix W, at 417a-427a. Although Mon Valley petitioned for appeal to the Pennsylvania Supreme Court, its petitions were "discontinued" on September 30, 1993, in

orders reported at 634 A.2d 225, 227 and reprinted in Appendix X, at 428a. On February 7, 1994, the PUC entered a tentative order setting forth its preliminary determinations as to the appropriate rate recalculations to be made to the modified Shannopin agreement, and directing the parties to file responses and replies. That unreported order is reprinted in Appendix Y, at 429a-438a.

JURISDICTION

The judgment of the Pennsylvania Commonwealth Court was entered on September 3, 1992. App. C. Petitioners' applications for reargument were denied in an order of that Court entered on November 10, 1992. App. D. The Pennsylvania Supreme Court denied petitioners' discretionary petitions for allowance of appeal in orders entered on December 30, 1993. App. A & B. This Petition is filed within ninety days of the entry of those orders, and is timely pursuant to Supreme Court Rule 13.1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.[1]

STATUTES AND REGULATIONS INVOLVED

This case involves legal issues arising under section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, and the rules implemented thereunder by the Federal Energy Regulatory Commission ("FERC"), particularly those set forth at 18 C.F.R. §§ 292.301 and 292.304 (1993). Those provisions of federal law are reprinted in Appendices Z and AA respectively, at 439a-451a. The PUC also has adopted rules implementing PURPA, as required by the federal statute. The pertinent provisions of those rules, 52 Pa. Code § 57.32 (1983), are set forth in Appendix BB, at 452a-453a.

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[1] The finality of the judgment from which petitioners seek review by this Court is addressed below at footnote 9.

STATEMENT OF THE CASE

A. Introduction.

This case is closely related to the Petition now pending before this Court styled *West Penn Power Company, et al.* v. *Pennsylvania Public Utility Commission, et al.*, Docket No. 93-1341 (filed Feb. 22, 1994). The former petition arises from West Penn's agreement with the developers of the Milesburg small power production project; this petition arises from an agreement with the developers of the Shannopin cogeneration project. Both petitions involve the interplay of provisions of PURPA and the FERC rules that require utilities to purchase electric energy from "qualifying facilities" at not more than the "avoided costs for such purchases," *see* 16 U.S.C. § 824a-3(b) and 18 C.F.R. § 292.304(a)(2), and the FERC rules that permit electric utilities and qualifying facilities to negotiate freely for contractual terms and conditions different from those imposed by regulatory mandate. *See* 18 C.F.R. § 292.301(b).

In this case, relying on the prior decisions of the Pennsylvania courts in the Milesburg proceedings, now at issue in No. 93-1341, the Pennsylvania PUC has granted a qualifying facility's request to modify substantially a freely negotiated contract when it could not meet the terms of that voluntary agreement, while at the same time refusing to permit West Penn and its largest customers to demonstrate that the passage of time contemplated by the modified contract results in an order that West Penn purchase power at a rate that is now far in excess of its full avoided costs for such purchases. Petitioners have contended throughout the proceedings on Mon Valley's petition to modify the contract that for the PUC to order those modifications without adjusting the rates to be paid Mon Valley for its power, so that they do not exceed West Penn's current avoided costs, constitutes a clear violation of the statutory directive of § 210(b) of PURPA, 16 U.S.C. § 824a-3(b). The PUC has rejected that contention, and the Pennsylvania Commonwealth Court affirmed that result by the narrowest of margins,

with three dissenting judges concluding that the PUC had violated PURPA by refusing to consider whether the modified agreement remained "just and reasonable to the . . . consumers of the electric utility and in the public interest," as required by § 210(b)(1) of PURPA, 16 U.S.C. § 824a-3(b)(1).

Despite the vigorous dispute among the judges of the intermediate appellate court about the requirements of PURPA, the existence of a clear and recognized conflict in authority among state courts of last resort, and the fact that West Penn's customers are being required by the PUC to absorb costs for power under the modified Shannopin agreement that will exceed West Penn's current avoided costs by at least $500 million, the Pennsylvania Supreme Court denied petitions for discretionary review. *See* App. A & B. That decision was influenced, no doubt, by the fact that a month earlier that Court had affirmed the Commonwealth Court's decision involving the Milesburg project by an equally divided court. *Armco Advanced Materials Corp.* v. *Pennsylvania Public Utility Comm'n*, ——— Pa. ———, 634 A.2d 207 (1993), *cert. pending*, No. 93-1341 (Feb. 22, 1994).

This Petition, and the petition now pending in the Milesburg case, present important questions of federal law that have divided reviewing courts in other states. Moreover, if petitioners are correct in their contention that the PUC and the Pennsylvania courts have misconstrued the requirements of PURPA, then West Penn's customers will be overcharged at least half a billion dollars over the life of the Shannopin project alone. The proceedings in the PUC and the Pennsylvania courts that have resulted in the decision under review have been long and tortuous. Petitioners summarize herein the essential facts material to this Court's consideration of the important questions of federal law that this Petition presents.

B. The First Phase Of The Shannopin Proceedings.

On October 15, 1987, West Penn entered into a contract with Mon Valley for the purchase of all energy and capacity to be produced at the Shannopin Mine Project, a proposed 80 megawatt coal-fired cogeneration plant, as defined by PURPA. One of the conditions precedent to this contract taking effect was a final PUC order allowing West Penn to pass through to its customers all charges to be paid under the agreement. The agreement called for West Penn to pay Mon Valley a capacity credit of 4¢ per kilowatt hour based on the "avoided" costs of three 300 megawatt coal-fired generating plants then planned to be placed in service during the period 1995 through 1998. The term of the agreement was for thirty years, to commence in or after August, 1992. *See* App. E, at 36a-39a. On July 8, 1988, over objection by the Pennsylvania Office of Consumer Advocate (representing all of West Penn's customers), and by several large industrial customers, including petitioners Armco Advanced Materials Company and Allegheny Ludlum Corporation ("Armco and Allegheny"), the PUC granted tentative approval to the rates in the Shannopin agreement, and authorized West Penn to collect the charges to be paid to Mon Valley from its customers. *Id.* at 84a.

On April 22, 1988, the Pennsylvania Commonwealth Court decided *Barasch* v. *Pennsylvania Public Utility Comm'n*, 119 Pa. Commw. Ct. 81, 546 A.2d 1296, *modified*, 119 Pa. Commw. Ct. 115, 550 A.2d 257 (1988), *appeal denied*, 523 Pa. 652, 567 A.2d 655 (1989), holding that the PUC's approval of West Penn's earlier energy purchase agreement with Milesburg Energy, Inc., without a formal trial-type hearing, denied the due process rights of West Penn's customers.[2] As a result of the *Barasch* decision, the PUC consolidated the Milesburg and Shannopin proceedings with two other petitions

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[2] The *Barasch* opinion is set out as Appendix E to the Petition for Writ of Certiorari in the Milesburg case, Docket No. 93-1341 (filed Feb. 22, 1994).

by West Penn for the pass-through approval of rates established in agreements with proposed qualifying facilities ("QFs") under PURPA, and assigned all four petitions to an ALJ for hearing. *See* App. F & G. Following an evidentiary hearing, the ALJ issued a massive recommended decision. In pertinent part, the ALJ recommended approval of the Shannopin agreement, that the rates it established were just and reasonable, and that West Penn should be authorized to pass through to its customers all charges resulting from the agreement. *See* App. H, at 208a. The PUC eventually adopted the ALJ's recommended decision with respect to the Shannopin agreement, with slight modifications, over objections by petitioners Armco and Allegheny, and by the Office of Consumer Advocate. *See* App. I & J. One Commissioner dissented. *See* App. K.

Separate appeals to the Commonwealth Court were filed by various parties with respect to three of the four agreements approved by the PUC, those involving the Milesburg, Shannopin and Burgettstown projects. On July 17, 1990, the Court reversed the PUC decisions in the Shannopin and Milesburg cases, holding that the PUC had erred in applying a "time of serious negotiations" standard for determining at what point a utility's avoided costs must be determined under PURPA, and adopted instead a standard based on the contract execution date. In its published opinion in the Milesburg case, the Court also approved the authority of the PUC, under PURPA, to order a utility to enter into a new contract with the developer of a QF after a previous contract had lapsed, but to require the utility to pay capacity charges based on the date that the old contract had been executed. *See Armco Advanced Materials Corp.* v. *Pennsylvania Public Utility Comm'n*, 135 Pa. Commw. Ct. 15, 579 A.2d 1337 (1990), *aff'd by equally divided court*, —— Pa. ——, 634 A.2d 207 (1993), *cert. pending*, No. 93-

1341 (Feb. 22, 1994).[3] That contract modification issue was not presented in the Shannopin case.[4]

In its unpublished separate opinion in the Shannopin case, the Commonwealth Court simply held that under the FERC regulations defining a QF's legally enforceable obligation to deliver energy or capacity, 18 C.F.R. § 292.304(d)(2), the PUC was required to calculate West Penn's avoided costs at the time the contract was executed, *i.e.*, as of October 15, 1987. *See* App. L. Noting that West Penn's corporate tax rates had changed between the date utilized by the parties in negotiating the agreement and the date the contract was executed, the Court remanded the case to the PUC to determine whether the agreed Shannopin capacity cost credits met the statutory criterion of being not greater than West Penn's avoided costs as of October 15, 1987. *See id.* at 285a-286a.

The Commonwealth Court denied West Penn's application for reargument and Mon Valley's petition for reconsideration on September 13, 1990. *See* App. M. West Penn, the PUC, and Mon Valley then each filed petitions for allowance of appeal to the Pennsylvania Supreme Court. Those petitions were denied on November 19, 1991, the same date on which that Court granted petitions for appeal in the Milesburg case. *See* App. N. The Court also denied West Penn's and the PUC's later applications for reconsideration, seeking to have the Shannopin and Milesburg cases decided together. *See* App. O (order dated February 14, 1992).

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[3] The published opinions of the Commonwealth Court and Pennsylvania Supreme Court in the Milesburg case are reprinted as Appendices A and B to the Petition for Writ of Certiorari in No. 93-1341.

[4] In September 1990, the Commonwealth Court issued an unpublished opinion in the Burgettstown case, also approving contract modifications mandated by the PUC. *Armco Advanced Materials Corp.* v. *Pennsylvania Public Utility Comm'n* (Nos. 2090 & 2097 C.D. 1989, Pa. Commw. Ct., filed Sept. 7, 1990).

C. The Second Phase Of The PUC's Proceedings On Shannopin.

On April 20, 1990, before the Commonwealth Court had issued its remand order in the Shannopin case, Mon Valley filed with the PUC a motion to stay or enjoin West Penn from implementing a "good faith deposit" requirement in the parties' agreement that called for Mon Valley to make a $120,000 deposit on May 1, 1990 on pain of automatic termination of the contract. Mon Valley also filed that same day a petition for the PUC to modify its voluntary agreement with West Penn. A single commissioner of the PUC granted Mon Valley's request for a stay of the "good faith deposit" in an emergency order dated April 27, 1990, but he noted that the petition to modify the contract would require a hearing under state law. *See* App. P. When the full PUC met on May 10, 1990, it rejected the requests of West Penn, Armco and Allegheny to rescind the emergency order. Instead, the PUC found that it had the authority under PURPA, the FERC rules and state law, to stay the good faith deposit dates and automatic termination provisions of the Shannopin agreement pending review by an ALJ of Mon Valley's petition to modify the contract. *See* App. Q.[5]

Mon Valley requested the PUC to modify its contract with West Penn in several significant respects. First, like the Milesburg agreement at issue in No. 93-1341, the Shannopin agreement contained various "milestone dates" for the developer to close on its project financing, for interconnection, and for commencement of energy delivery. Mon Valley requested that those dates be extended by two years across the board, or for a set period of months following the entry of a non-appealable PUC order approving the Shannopin agreement, whichever occurred later. Second, the agreement required Mon Valley to make good faith deposits on May 1, 1990,

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[5] Commissioner Fischl, who had dissented from the PUC's contract modification orders in the Milesburg and Burgettstown cases, *see* App. K, also noted his dissent from this PUC Order. *See* App. Q, at 298a.

July 2, 1990 and October 1, 1990. Mon Valley requested that those dates also be extended by two years, or for a set period of months following a non-appealable PUC order. The petition also requested that Mon Valley be permitted to extend the term of its financing, and to change the boiler design in its proposed facility from a circulating fluidized bed to a design using a pulverized coal boiler and dry scrubber. *See* App. S, at 324a-325a.

The ALJ required the parties to "pre-file" statements of their direct testimony concerning these requested modifications. In a "Second Pre-Hearing Order," entered on January 9, 1991, the ALJ advised that he would strike certain testimony and evidence proffered by West Penn, which would enable the PUC to determine whether the capacity cost credits agreed to under the original October 15, 1987 agreement were equal to or less than West Penn's *current* avoided capacity costs. The ALJ reasoned that while the appeals from the first phase of the Shannopin proceedings remained pending (on petitions for appeal to the Pennsylvania Supreme Court), the PUC had no jurisdiction over any avoided cost issues. *See* App. R, at 312a. Moreover, the ALJ determined, based on the past precedents of the PUC and Commonwealth Court in the Milesburg and Burgettstown cases, that Mon Valley's petition to modify its "voluntary agreement" with West Penn would not require a determination of West Penn's *current* avoided capacity costs. *Id.* at 313a.

The hearing on Mon Valley's request for contract modifications consumed three days of testimony before the ALJ in late January, 1991. Consistent with the indications given in his second pre-hearing order, the ALJ struck West Penn's testimony and exhibits regarding its current avoided costs as of January, 1991. *See* App. S, at 323a.[6]

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[6] The evidence "struck" by the ALJ included proposed testimony and exhibits demonstrating that "West Penn's current avoided capacity costs are zero because its need for additional new capacity is so far in the future (2001 before 80 MW is needed)." In addition, the testimony would have shown that "West Penn's projected next new capacity additions are combustion turbines which would

During the briefing before the ALJ it became apparent that Mon Valley also desired to assign its contract with West Penn to a new entity, Mon Valley Energy Limited Partnership, having two general partners—Mon Valley and a wholly-owned subsidiary of a large electric utility based in Michigan. After reviewing the contentions of all the parties, including petitioners' arguments that the proposed contract modifications were not consistent with the requirements of PURPA, the ALJ recommended that Mon Valley's petition for modification should be granted in all respects. *See* App. S, at 377a-379a. The ALJ's recommended decision was issued on May 23, 1991.

At its public meeting on August 29, 1991, the PUC adopted the recommended decision. The PUC's order was not issued, however, until January 14, 1992. *See* App. T. The PUC determined that the issues raised by Mon Valley's petition to modify the contract were substantially identical to the questions decided in the Commonwealth Court's prior decisions granting the PUC " 'full discretion in the exercise of its power under PURPA and the FERC regulations to encourage the development of cogeneration and small power production to ensure that litigation delays do not become the factor that determines whether a project proceeds or fails.' " App. T, at 383a (quoting *Armco Advanced Materials Corp.* v. *Pennsylvania Public Utility Comm'n, supra,* 579 A.2d at 1349-50).

The PUC rejected arguments raised both by West Penn and by Armco and Allegheny that it lacked the authority under PURPA to modify the terms of a voluntarily negotiated purchase agreement. App. T, at 384a-385a. The PUC also rejected the petitioners' contention that the capacity rates in the modified Shannopin agreement would far exceed West Penn's *current* avoided costs, and that the PUC

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result in avoided capacity costs which over a 30-year purchase term would be $500 million less than the payments under the existing Shannopin Agreement." Pennsylvania PUC, Docket No. P-880286, Direct Testimony of Regis F. Binder, Manager, Generation Planning Projects, Allegheny Power Service Corporation, at page 2.

order thereby violated § 210(b) of PURPA. The PUC reasoned that "West Penn's attempt to refocus the proceeding to its current avoided cost projections is irrelevant because the Commonwealth Court has ordered that the correct projections under § 210 of [PURPA] are those in effect when the [agreement] was signed." App. T, at 385a (footnote omitted). The PUC, like the ALJ, also determined that any efforts by the petitioners to inject current avoided capacity costs into the modification proceedings initiated by Mon Valley were beyond the scope of those proceedings. *Id.* at 387a. And the PUC rejected the related argument that the extent of the modifications requested by Mon Valley transformed the "old" voluntary agreement into a "new" agreement mandated by the PUC under PURPA, necessitating a new determination of avoided costs. The PUC reasoned that the Commonwealth Court had rejected similar arguments in its past decisions approving modifications to the Milesburg and Burgettstown contracts. *Id.* at 390a. Finally, the PUC also affirmed the ALJ's determination to exclude from evidence all testimony and exhibits related to West Penn's current avoided cost projections. *Id.* at 393a.

D. The Decision Of The Commonwealth Court In The Second Phase Of The Shannopin Proceedings.

West Penn and Armco and Allegheny appealed the PUC's order to the Commonwealth Court, raising both procedural issues under state law (principally involving whether the PUC had the authority to entertain Mon Valley's requests for a stay and for modifications of the agreement while the first phase of the proceedings was pending on appeal), and the issues of federal law raised by this Petition. The Commonwealth Court described the federal questions presented in the appeal as raising four separate issues:

> "[1] whether the [PUC] has authority to modify an EEPA [electric energy purchase agreement]; [2] whether the [PUC's] granting of new terms of the EEPA creates a new contract which requires a new determination of avoided cost under 18 C.F.R.

> § 292.304(d) as of the date of the allegedly new legally enforceable obligation; [3] whether the [PUC's] contract modifications are improper because they are not just and reasonable to West Penn's customers or in the public interest as required by PURPA; and [4] whether the [PUC] erred in striking the testimony of two of West Penn's witnesses regarding [current] avoided costs. . . ." App. C, at 8a.

After deciding the procedural issues in favor of the PUC and Mon Valley, the Commonwealth Court majority reaffirmed the authority of the PUC to modify existing voluntary PURPA agreements, and rejected West Penn's assertion that the PUC's exercise of this authority had eviscerated the FERC rules recognizing a distinction between voluntary agreements and commission orders to purchase energy from a QF. The Court attempted to distinguish state court decisions from Vermont and Texas that had recognized that distinction. *Id.* at 17a-18a. The Commonwealth Court relied on its earlier reasoning in the Milesburg case to the effect that West Penn, by submitting a voluntary agreement to the PUC for pass-through approval of contract rates, had transformed the voluntary agreement into the legal equivalent of a petition by Mon Valley to require West Penn to purchase its power. *Id.* at 18a-19a.

The Commonwealth Court also rejected arguments made by both petitioners that the PUC's order approving the contract modifications created a new date for the determination of avoided costs, consistent with PURPA's express requirements that the charges for power mandated by federal law must be not greater than the utility's avoided costs, and must be fair to the utility's customers and in the public interest. In doing so, the majority went so far as to opine that West Penn's stricken testimony concerning its current avoided capacity costs was "disingenuous," because in 1987 West Penn had agreed to the rates established in the Shannopin contract, and in 1988 it had sought pass-through approval from the PUC for those rates. *Id.* at 20a. The Court also reasoned that,

"in the *Milesburg* line of cases, the original [agreement] forms the basis for the continued obligation on the part of the utility to acquire energy from the QF." *Id.*

The Commonwealth Court found the modifications to the milestone dates in the Shannopin agreement to be just and reasonable to West Penn's customers because the rates established *in the original contract* were less than West Penn's avoided capacity costs *as of the date of that agreement*. *Id.* at 21a-22a. As for the other terms of the modifications, the Court found them to be insignificant. *Id.* at 22a-23a. Having determined that West Penn's current avoided costs were irrelevant to the issues presented by Mon Valley's petition to modify the contract, the Court found no error in the ALJ's decision to strike West Penn's evidence. *Id.* at 24a.

Three judges dissented from the Commonwealth Court's decision on the Shannopin appeal.[7] Judge Pellegrini, writing for the dissenters, argued that the PUC, in approving the contract modifications sought by Mon Valley, had failed to consider whether the rates established under the modified contract *remained* just and reasonable to West Penn's customers, as PURPA required. Although the dissenters would have held, contrary to the views of petitioners, that the PUC has the authority to extend the milestone dates in a voluntary agreement where litigation delays so warranted, they also would have held that the PUC must consider "if such extensions are in the best interest of ratepayers and the public." App. C, at 31a. The dissenters accused the PUC of ignoring the specific requirements of PURPA § 210(b)(1), adhering instead to the erroneous view that PURPA "mandate[s] that QFs

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[7] It is worthy of note that the earlier decisions of the Commonwealth Court, upon which the majority rested its decision in this case, had been unanimous. Two of the judges who had joined in the Court's published decision in the *Milesburg* case, *Armco Advanced Materials Corp.* v. *Pennsylvania Public Utility Comm'n*, 135 Pa. Commw. Ct. 15, 579 A.2d 1337 (1990), together with a new judge, dissented from the Court's opinion approving the modifications to the Shannopin contract.

be built at all costs." *Id.* (footnote omitted). By refusing to allow West Penn to submit evidence that circumstances had changed, such that it no longer required the new base load capacity to be "avoided" by the purchase of power from the Shannopin project, the PUC and the majority had failed to protect West Penn's customers, who now "will be forced to pay an additional $500,000,000 in rates for unneeded power." *Id.* at 33a.[8]

The dissenters also contended that just as the Pennsylvania courts had recognized the power of the PUC to modify voluntary agreements to rescue developers from their own "bad bargains" by, for example, extending agreed milestone dates, the PUC should also be required to rescue "ratepayers from a purchase agreement that is no longer 'just and reasonable' or in the public interest." *Id.* at 33a-34a. For these reasons, the dissenters would have remanded the case to the PUC to review West Penn's evidence on its current avoided capacity costs, and to determine (1) whether the Shannopin project now would result in excess capacity; and (2) whether the rates negotiated in 1986 and 1987 should now be modified so that they would remain fair and reasonable to West Penn's customers based on the facts available in 1991 and 1992. *Id.* at 34a.

Petitions for allowance of appeal to the Pennsylvania Supreme Court, raising the federal questions presented by this Petition, were timely filed by West Penn and by Armco and Allegheny. Both petitions were denied in orders entered on December 30, 1993. *See* App. A & B.

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[8] The dissenters noted that the majority's characterization of West Penn's evidence on its current avoided capacity costs and its lack of any current need for the Shannopin power as "disingenuous" was unfair. "[R]ather than lacking in candor, by this statement, West Penn is properly informing the PUC that the passage of time has shown that its projection of expected base capacity demand was erroneous. The majority's statement is like telling a weather reporter that he or she is disingenuous for telling you it's sunny outside [today] when he or she forecast rain yesterday." App. C, at 32a, n.7.

E. Subsequent Proceedings.

While the proceedings on Mon Valley's petition for modification were pending before the ALJ, the PUC issued two orders on remand from the Commonwealth Court's first decision involving the Shannopin project. *See* App. U & V. In those orders, the PUC took a decidedly narrow view of the recalculations it must perform to take account of West Penn's avoided capacity costs as of the October 15, 1987 date mandated for comparison by the Commonwealth Court. As a result, on March 10, 1993, the Commonwealth Court, on appeal by these petitioners, vacated the PUC's order on remand, and remanded again for a new calculation of West Penn's avoided capacity costs as of October 15, 1987. *See* App. W. Mon Valley petitioned for appeal from that decision to the Pennsylvania Supreme Court, but later discontinued its petitions. *See* App. X. On February 7, 1994, the PUC issued its most recent "tentative order" in this matter, setting out preliminary PUC calculations of the appropriate payments to be made to Mon Valley, calculated as of October 15, 1987, and directing the parties to file written responses to those calculations, and replies to the responses of the other parties. *See* App. Y. A favorable decision by this Court on the questions presented in this Petition will render moot the PUC's most recent tentative order with respect to the Shannopin agreement.[9]

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[9] The decision of the Commonwealth Court in the second phase of the Shannopin proceedings is a final judgment with respect to the federal issues presented by this Petition. All subsequent proceedings have involved questions which assume, erroneously, that the modifications made by the PUC to the Shannopin agreement in 1991 are valid under PURPA, and that the PUC order mandating those modifications did not trigger any requirement that the capacity cost rates established in the 1987 agreement *remain* less than or equal to West Penn's avoided capacity costs at the time of the PUC's order approving the modifications, or that they *remain* just and reasonable to West Penn's customers. *See Duquesne Light Co.* v. *Barasch*, 488 U.S. 299 (1989) (holding that a decision of the Pennsylvania Supreme Court was a final judgment subject to review under 28 U.S.C. § 1257, notwithstanding that Court's re-

REASONS FOR GRANTING THE WRIT

When Congress enacted PURPA in 1978 its stated objectives were: "to encourage—(1) the conservation of energy supplied by electric utilities; (2) the optimization of the efficiency of use of facilities and resources by electric utilities; and (3) equitable rates to electric consumers." PURPA § 101, 16 U.S.C. § 2611. *See also FERC* v. *Mississippi*, 456 U.S. 742, 746 (1982). To encourage that rates to electric consumers be "equitable," Congress mandated in § 210(b) of PURPA that the rules promulgated by FERC "shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase . . . shall be just and reasonable to the electric consumers of the electric utility and in the public interest. . . ." 16 U.S.C. § 824a-3(b). Section 210(b) also provides that no FERC rule "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." *Id.*

The FERC rules adhere to those statutory requirements. Nonetheless, in applying those rules, the PUC and the Pennsylvania courts have completely lost sight of the statutory mandate, insofar as Congress required that

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mand to the PUC for further proceedings to revise relevant rate orders).

As in the *Duquesne Light* decision, the opinion of the Commonwealth Court in this case represents the "last word" of the Pennsylvania courts on the issues of federal law presented by this Petition. 488 U.S. at 307. With respect to any continuing arguments by petitioners that the PUC exceeded its authority under PURPA by approving the contractual modifications sought by Mon Valley in April 1990, or by failing to require a comparison of the contract rates with West Penn's avoided capacity costs as of the date of the PUC order approving those modifications, the Commonwealth Court's decision "has left 'the outcome of further proceedings preordained.'" *Id.* at 306 (quoting *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479 (1975)).

If this Petition is granted, petitioners will seek an immediate stay of all further proceedings before the PUC contemplated by the Commonwealth Court's latest remand order.

all rates passed on to consumers for power sold to utilities under PURPA must be "just and reasonable," and that no rate may exceed a utility's avoided costs. Instead, as the dissenting judges of the Commonwealth Court observed in this case, the PUC seems to have adopted the policy that PURPA mandates "that [qualifying facilities] be built at all costs," App. C, at 31a, and that a utility's customers must pay those costs, even if the power is not needed.

The legislative history of PURPA conclusively demonstrates that this is not what Congress had in mind when the statute was enacted. The Conference Committee stated instead that cogenerators and small power producers were not to be guaranteed a rate of return on their investment and that their "risk in proceeding forward . . . is not guaranteed to be recoverable." Moreover, the Committee advised that the provisions of PURPA "are not intended to require the ratepayers of a utility to subsidize cogenerators or small power producers." H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 97-98 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7831-32.

The proceedings in this case, and in the Milesburg case, docketed in this Court as No. 93-1341, reflect a policy by the Pennsylvania PUC to ensure that the developers of qualifying facilities recover their costs of going forward, that they obtain rates for their power that ensure profits, that any risks they undertake through voluntary agreements with the purchasing utilities eventually may be avoided, and that the consumers of electricity in Pennsylvania must assume those risks and subsidize the developers. In implementing this "hidden agenda," while claiming that PURPA requires such results, the PUC and the Commonwealth Court have run roughshod over specific FERC rules designed to create a role for voluntary agreements between PURPA developers and purchasing utilities. And they have totally disregarded the principles of equitable rates and least cost pricing mandated for implementation by Congress.

The important issues of federal law raised in this Petition are variations on the questions presented in No. 93-1341. Petitioners adopt herein all the arguments warranting review that were presented in that petition, and direct the Court's attention to specific factors further favoring this Court's exercise of its discretion to review the decisions of the Pennsylvania courts in both cases.

I. THE PUC AND THE PENNSYLVANIA COURTS HAVE MISCONSTRUED THE PURPA REGULATIONS, AND DEVIATED FROM FEDERAL POLICY, BY EQUATING THE SUBMISSION TO THE PUC OF A FREELY-NEGOTIATED AGREEMENT FOR RATE APPROVAL WITH A PETITION FOR THE PUC TO ORDER A UTILITY TO ENTER INTO A CONTRACT WITH A QUALIFYING FACILITY.

The FERC regulations create an important role for the private negotiation of "PURPA contracts" between utilities and the developers of qualifying facilities. Section 292.301(b) of the FERC rules states:

> "Nothing in this subpart:
>
> (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or
>
> (2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase."

In implementing the requirements of PURPA, the Pennsylvania PUC also adopted rules exempting negotiated contracts from the regulatory scheme. *See* 52 Pa. Code § 57.32(c) (1983), reprinted in App. BB.[10]

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[10] The PUC's regulations not only track the language of § 292.301(b), but also add a requirement that "[e]ach utility shall file with the Commission a copy of any contract or agreement that it enters into with a qualifying facility with a design capacity of 500 kilowatts or more." *Id.* § 57.32(c)(2). The state regulations also promised that "nothing in this subchapter will affect existing contracts or future contracts freely entered into by utilities and

In *American Paper Institute* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983), this Court also recognized the key role that private contracts play under the regulatory scheme implemented by FERC, observing that "it may often be in the interest of a qualifying facility to negotiate a long-term contract at a lower rate [than the full-avoided-cost rate otherwise applicable under the FERC rules]. The [FERC's] rule simply establishes the rate that applies in the absence of a waiver or a specific contractual agreement." 461 U.S. at 416.

In this case, respondent PUC and the Pennsylvania courts have eviscerated the federal policy favoring free negotiation of long term contracts between utilities and qualifying facilities by permitting a qualifying facility to walk away from its contractual obligations to comply wth important milestone dates and to make "good faith deposits," but to retain nonetheless a purported federal statutory right to compel the utility to abide by the pricing terms of the contract. Moreover, the utility is compelled to adhere to a pricing structure that was tied to its full avoided costs as of the date the contract was executed, even though by the time the contract was modified by PUC mandate, the utility's avoided capacity costs had been greatly reduced and it no longer had a need for the power that the PUC required it to purchase. Under the principles adopted in this case, there ultimately is no distinction between a negotiated agreement and the mandatory contract that may be ordered by a regulatory commission under PURPA, and a qualifying facility may obtain the best features of both. Furthermore, any incentive for a utility even to attempt to protect its customers from excessive rates, for example, by negotiating for project milestone dates and automatic termination provisions, has been destroyed.

As the Commonwealth Court grudgingly recognized in the decision below, courts of last resort from other states have correctly interpreted the FERC rules, and main-

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qualifying facilities," and that "[l]ong term contracts are encouraged." *Id.* § 57.32(a).

tained the distinction between negotiated contracts and commission orders to purchase power. For example, in *Public Utility Comm'n* v. *Gulf States Utilities Co.*, 809 S.W.2d 201 (Tex. 1991), the Supreme Court of Texas reversed a public utility commission's ruling that had disapproved a negotiated contract permitting the utility to recover from its ratepayers contractual payments made to a qualifying facility in excess of avoided costs. The Court first held that the Texas PUC's avoided-cost rules, implementing PURPA, were completely inapplicable to voluntary agreements. 809 S.W.2d at 207-08. Moreover, the Court held, contrary to the decision in this case, that the FERC rules themselves did not grant state commissions any authority to regulate negotiated purchases: "Like the Texas regulations, the federal regulations do not authorize the Commission to alter the terms of a purchased power contract between a utility and a QF." *Id.* at 208.

As the *Gulf States* Court recognized, *id.* at 209, its holding was supported by decisions from other states as well. In *In re Vicon Recovery Systems*, 153 Vt. 539, 572 A.2d 1355 (1990), the Supreme Court of Vermont reviewed a decision of the state's Public Service Board, denying a request for approval of a negotiated agreement between a utility and a qualifying facility. The parties' contract, like the agreement at issue here, required the Board's rate approval as a condition precedent to the contract taking effect. On appeal, the qualifying facility claimed that the Board was required by PURPA and the FERC rules to approve the contract; the utility contended that the contract was unenforceable because Board approval was a negotiated condition precedent to the contract taking effect. The Vermont Court rejected the qualifying facility's preemption claim because "[w]here voluntary power purchase contracts are involved . . . [FERC's regulatory] rate scheme is inapplicable, and we believe that state regulatory oversight must therefore be contemplated." 572 A.2d at 1358. The Court also upheld the decision of the Board to disallow the rate set by the contract because it was not "just and

reasonable" in light of current economic conditions. *Id.* at 1360-61. If the PUC and the Pennsylvania courts had followed the *Vicon* approach in this case, they would have required Mon Valley to abide by its negotiated contract, including the milestone and good faith deposit dates; or they would have determined capacity rates for any purchase of power mandated by the PUC based on West Penn's avoided costs as of the date of the PUC's modification order in 1991, rather than the original date of contract execution in October, 1987.[11]

The Commonwealth Court did not address other decisions that also recognize the distinction in the FERC rules between negotiated contracts and commission orders to purchase. *See, e.g., Water Power Co.* v. *PacifiCorp*, 99 Or. App. 125, 781 P.2d 860 (1989), *review denied*, 309 Or. 291, 787 P.2d 887, *cert. denied*, 498 U.S. 811 (1990); *Bates Fabrics Inc.* v. *Public Utilities Comm'n*, 447 A.2d 1211 (Me. 1982) (both of which are discussed at length in the Petition in No. 93-1341, at 22-23).

Each of the state court decisions cited herein adopted as a controlling legal principle the notion that PURPA and the FERC rules carve out an area for the private

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[11] The Commonwealth Court's efforts to distinguish *Gulf States* and *Vicon* were entirely unpersuasive. The argument that the Vermont decision is "different" because the Public Service Board was not required to hold an evidentiary hearing, *see* App. C, at 17a, is difficult to fathom. Whether the state commission proceeds by way of evidentiary hearing, or otherwise, the question is whether the commission has a "broad power" under PURPA, which the PUC has arrogated to itself, to modify freely negotiated contracts at will without affecting the dates for determining the utility's avoided costs. And in *Gulf States*, the state commission conducted an evidentiary hearing. 809 S.W.2d at 206. In attempting to distinguish *Gulf States*, the Commonwealth Court was forced to rely on the twisted logic of its Milesburg decision, that a request for pass-through approval of contractual rates converts a freely negotiated contract into a developer's petition to compel a purchase of energy, *except that the date of the avoided cost determination relates back to the date of the freely negotiated contract. See* App. C, a 18a-19a. There is no support in PURPA or the FERC rules for that contrived reasoning.

negotiation of contracts, the terms of which are binding on qualifying facilities. In *Gulf States* and *Vicon*, in particular, the state commissions were asked to approve the terms of such negotiated agreements. The Supreme Courts of Texas and Vermont did not adopt the rationale of the Pennsylvania Commonwealth Court in this case—that a contractual provision calling for advance rate approval of a private contract gave the commission a license under PURPA to "reform" the contract by modifying or invalidating the significant terms to which a qualifying facility had agreed. Indeed, those courts explicitly rejected the notion that PURPA and the FERC regulations mandate commission oversight of freely-negotiated contracts.

The Pennsylvania PUC and reviewing courts have misinterpreted federal law by: (1) dissolving the distinction between freely-negotiated agreements and federally-mandated orders to purchase, a distinction which is clearly drawn in the FERC rules; (2) allowing qualifying facilities to avoid their contractual obligations designed to protect a utility and its customers from excessive rates; and (3) granting the PUC a broad mandate to "reform" negotiated contracts by rewriting them to comply with a misguided notion of what federal PURPA policy requires. The clear conflict over this question among state courts of last resort, and the absence of any other forum for the resolution of this important issue of federal law,[12] warrants plenary review by this Court.

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[12] Section 210(g)(1) of PURPA, 16 U.S.C. § 824a-3(g)(1), allows federal judicial review of proceedings conducted by state regulatory authorities under PURPA only to the extent that such review may be obtained under 16 U.S.C. § 2633. The latter provision deprives federal courts, *except this Court*, of jurisdiction over actions arising under subchapters I and II of PURPA, with limited exceptions designed to enforce certain procedural rights. Thus, for all practical purposes, this Court is the only federal court that may take appellate jurisdiction over the important questions of federal law decided by state commissions purporting to act under PURPA.

II. IN MISINTERPRETING THE CIRCUMSTANCES UNDER WHICH A QUALIFYING FACILITY HAS A LEGALLY ENFORCEABLE OBLIGATION TO DELIVER ENERGY TO A UTILITY, THE PUC AND PENNSYLVANIA COURTS HAVE FAILED TO ABIDE BY PURPA'S REQUIREMENTS THAT THE RATES FOR PURCHASES OF POWER MANDATED BY THE STATUTE "SHALL BE JUST AND REASONABLE TO THE . . . CONSUMERS OF THE ELECTRIC UTILITY" AND NOT GREATER THAN THE UTILITY'S "INCREMENTAL COST."

Although Congress intended by enacting PURPA to create conditions in which cogenerators and small power producers could more readily sell their power to utilities, the statute expressly provides that a utility's ratepayers are not required to subsidize those sales. *See* pages 18-19, *supra*. The FERC rules follow the statutory requirements to the letter, repeating the commands that rates shall "[b]e just and reasonable to the electric consumer," and that the rules do not require "any electric utility to pay more than the avoided costs for purchases." 18 C.F.R. § 292.304(a).[13] In *American Paper Institute, supra*, this Court upheld the FERC rules that had set the purchase rate for power supplied by qualifying facilities at the statutory maximum, as a reasonable reconciliation of Congress' goals of encouraging cogeneration and small power production, while not penalizing the interests of consumers. *See* 461 U.S. at 412-18.

The mechanics of the rate setting rules adopted by FERC are tied to the timing of the qualifying facility's actual delivery of power to the purchasing utility or the existence of a "legally enforceable obligation" to deliver. 18 C.F.R. § 292.304(d). For a facility such as Shannopin that chooses to sell both energy and capacity to a utility over a specified term, the rules provide:

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[13] The rules make clear that "avoided costs" and the "incremental cost . . . of alternative electric energy" described in PURPA § 210(b) are equivalent. 18 C.F.R. § 292.101(b)(6); *see American Paper Institute, supra*, 461 U.S. at 406.

> [T]he rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) *The avoided costs calculated at the time the obligation is incurred.*

18 C.F.R. § 292.304(d)(2) (emphasis added).

In the Shannopin agreement, and in all proceedings before the PUC and Pennsylvania courts, Mon Valley has chosen to have its capacity rates calculated based on West Penn's avoided costs "at the time the obligation is incurred." But the critical question of federal law presented by the PUC's order modifying the contract, and the Commonwealth Court's decision affirming that order, is *when* the obligation was incurred. As described above, if the PUC and Commonwealth Court had determined that Mon Valley's legally enforceable obligation to deliver energy and capacity to West Penn was incurred as of the date of the PUC's modification order in 1991, rather than the date of the original contract in October, 1987, West Penn's avoided costs over the term of the mandated contract would be calculated at $500 million less than what the PUC has required. Indeed, if West Penn had been permitted to introduce evidence at the modification hearing of its capacity needs as of 1991, the PUC would have been forced to conclude that West Penn had *no need* for the Shannopin capacity at any price. The PUC's decision to require West Penn to enter into a modified contract, using the same capacity rates as those set in the original agreement, therefore created at least a $500 million windfall for Mon Valley, and will result in rates that are neither "just and reasonable" to West Penn's customers, nor less than West Penn's "incremental cost," as § 210(b) of PURPA requires. The decisions of the PUC and the Commonwealth Court have given no weight at all to these fundamental statutory requirements.

Other courts, in similar circumstances, have properly taken § 210(b) of PURPA into account. For example, in *Vicon, supra,* the Vermont Supreme Court adopted the view that where a privately negotiated agreement was conditioned on approval by the state's Public Service Board, the qualifying facility had no "legally enforceable obligation" to deliver power until that approval had been obtained. As a result, it was the time of regulatory approval, and not the date of the contract's execution some four years earlier, that controlled the Board's determination of the utility's avoided costs. *See* 572 A.2d at 1360. This interpretation of the parties' agreement, informed by PURPA and the FERC rules, allowed the Public Service Board to judge the reasonableness of the rates in the light of current economic conditions, and to determine correctly that the rates no longer were "just and reasonable." *Id.* It is this approach that the dissenters urged upon the Commonwealth Court in this case, to no avail.

In a subsequent case, the Vermont Supreme Court upheld a decision by the Public Service Board to deny a required "certificate of public good" for a proposed cogeneration facility based on a determination that the scheduled payment rates, although consistent with the utility's avoided costs at the time of the contract, were excessive under current "marketplace realities." *Petition of East Georgia Cogeneration,* 158 Vt. 525, 614 A.2d 799, 803 (1992). The Court *rejected* the cogenerator's argument that to deny approval of agreed contract rates based on "changed circumstances" violated PURPA and the FERC rules. The Court reasoned that "neither the federal statute nor the regulations require utilities to purchase power at a price above actual avoided cost." *Id.* at 804. Contrary to the approach adopted in this case by the PUC and the Commonwealth Court majority, the Vermont Supreme Court affirmed its Board's policy that "current market conditions 'must remain the ultimate test of whether a proposed power sale (particularly one that is mandatory for the utilities under federal and state law) is in the general good of the state.' " *Id.* The Court found

"no error in the Board favoring concern for ratepayers over concern for return on the investment of entrepeneurs where, as here, the proposed project seeks rates higher than those mandated by federal law." *Id.*

The Idaho Supreme Court recently reached a similar result in *A.W. Brown Co.* v. *Idaho Power Co.*, 121 Idaho 812, 828 P.2d 841 (1992). In *Brown*, a small power producer sought to require a utility to purchase hydroelectric energy in accordance with its published standard rates for qualifying facilities. Despite the fact that the producer had attained qualifying status under PURPA, its negotiations with the utility had not reached the stage where it was bound to deliver power to the utility at the standard rate. The Idaho PUC and the state's Supreme Court determined that there could be no "legally enforceable obligation" under the FERC rules until the facility was legally committed to deliver its power. The Court adopted the Idaho PUC's reasoning that, otherwise, "a project developer could lock in a rate in the year of its QF certification, but not begin producing power for several years after, by which time utility avoided costs may well have declined." 828 P.2d at 847. The Idaho Supreme Court refused to countenance a situation in which ratepayers could be required to pay more than a utility's *current* avoided costs, in violation of § 210(b) of PURPA. *Id.*

Under the approaches to PURPA § 210(b) and the FERC rules adopted by the Supreme Courts of Vermont and Idaho, West Penn could not have been ordered in 1991 to enter into a modified contract with Mon Valley calling for capacity payments that were far in excess of its then-current avoided capacity costs. The PUC and Pennsylvania courts have misconstrued the requirements of federal law, and achieved a result that will cost West Penn's ratepayers at least $500 million for capacity that is no longer needed.

Pinpointing when a utility incurs a "legally enforceable obligation" has become dramatically more significant in

recent years, as a confluence of economic factors has sharply reduced the avoided costs of electric power—contrary to earlier expectations of utilities, developers of qualifying facilities, state commissions, and Congress itself. Congress enacted PURPA in response to the energy crisis in the 1970s, with the expectation that alternative energy sources would reduce the nation's dependence on increasingly more expensive foreign oil. Congress also commanded in PURPA, however, that consumers *not* bear the burden of encouraging cogeneration or small power production. FERC's "legally enforceable obligation" rule readily served both PURPA policies (encouragement of alternative energy production and ratepayer neutrality) so long as avoided costs of electricity were rising: Utility customers were not harmed if avoided costs were calculated upon a "legally enforceable obligation" accruing prior to delivery. In a falling avoided-cost market, however, customers can be severely prejudiced by an interpretation of that rule favoring developers, and state courts and public utility commissions have struggled to reconcile the competing federal policies.[14]

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[14] In addition to the cases described in the text, *compare Long Island Lighting Co.* v. *Public Serv. Comm'n*, 606 N.Y.S.2d 406 (3d Dep't 1993) (declining to apply higher avoided-cost rates predicated on erroneous assumption of utility's need for additional capacity because rates would not be "just and economically reasonable" to ratepayers in current market) *and Xiox Corp. v. Public Serv. Comm'n*, 190 A.D.2d 350, 598 N.Y.S.2d 821 (3d Dep't) (declining to apply higher avoided-cost rates predicated on erroneous forecast of the effect Gulf War would have on oil prices), *appeal dismissed*, 82 N.Y.2d 790, 604 N.Y.S.2d 551, 624 N.E.2d 688 (1993) *with Appeal of Public Serv. Co. of New Hampshire*, 130 N.H. 285, 539 A.2d 275 (1988) (applying higher avoided-cost rates from past notwithstanding intervening decline in price of oil and avoided costs) *and Smith Cogeneration Mgmt., Inc. v. Corporation Comm'n*, 863 P.2d 1227 (Okla. 1993) (state rule requiring qualifying facilities and utilities to include in their contracts a provision permitting commission to revise rates throughout the duration of the contract held preempted by PURPA and FERC rules, notwithstanding that rule was promulgated to assure just and reasonable rates to consumers).

Because of the peculiar jurisdictional provisions of PURPA, *see* note 12 *supra*, where state tribunals are principally responsible for implementing federal law, this Court's guidance is required to resolve these important and recurring policy questions. This Court should accept plenary review of this case, and the petition in No. 93-1341, to reconcile the conflicting approaches of state courts to the question of what constitutes a "legally enforceable obligation" under the FERC rules, and how those rules should be interpreted consistent with the statutory commands that rates are to be "just and reasonable," and shall not exceed "incremental cost."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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